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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 208

MACHINERY, SCRAP IRON, METAL & STEEL CHAUFFEURS, WAREHOUSEMEN, HANDLERS, HELPERS, ALLOY FABRICATORS, THEATRICAL, EXPOSITION, CONVENTION AND TRADE SHOW EMPLOYEES, LOCAL UNION NO. 714, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Petitioner,

vs.

ROSS M. MADDEN, AS REGIONAL DIRECTOR OF THE NATIONAL LABOR RELATIONS BOARD FOR THE THIRTEENTH REGION.

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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INDEX.

	PAGE
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement of the Case	4
The Decisions Below	6
Reasons for Granting the Writ	6
Conclusion	11
Appendix A	13

CITATIONS.

Boire v. Greyhound Corporation, 376 U. S. 473 ..... 6, 10

Great Atlantic and Pacific Tea Company, 100 N. L. R. B. 1494 ..... 6, 7, 8

Leedom v. Kyne, 358 U. S. 184 ..... 6, 10

Retail Clerks v. Montgomery Ward, 316 F. 2d 754 7

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner, Machinery, Scrap Iron, Metal & Steel Chauffeurs, Warehousemen, Handlers, Helpers, Alloy Fabricators, Theatrical, Exposition, Convention and Trade Show Employees, Local Union No. 714, International Brotherhood of Teamsters, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on April 7, 1965.

OPINIONS BELOW.

The opinion of the United States District Court for the Northern District of Illinois, Eastern Division, is set forth at pages 14-17 of the Brief and Appendix for Plaintiff-Appellant in the Court of Appeals (nine copies of which have been filed with this Court). This opinion is unreported in the Federal Supplement, however, it is reported in the Bureau of National Affairs Reports at 57 LRRM 2284. The opinion of the Court of Appeals is reported at 343 F. 2d 497 and is reprinted in Appendix A, p. 13a.

JURISDICTION.

The judgment of the Court of Appeals was entered on April 7, 1965. This Court has jurisdiction to review the judgment below under 28 U. S. C. Sec. 1254 (1).

QUESTIONS PRESENTED.

1. What is the effect of prior specific approval and ratification by the employees in the unit of inclusion of a union shop clause in a collective bargaining agreement upon a petition and election for union shop deauthorization under section 9(e)(1) of the Labor Management Relations Act of 1947, as amended?

2. Does an affirmative vote for union shop deauthorization under Section 9(e)(1) of the Act only revoke the union's future authority to bargain for a union security clause or is the union shop clause in the current contract rescinded immediately?

3. The extent of Federal equity jurisdiction relative to a suit by a labor union seeking to enjoin a National Labor Relations Board election on the ground that the Board has completely misinterpreted and misconstrued the effect to be given a Federal statute.

STATUTES INVOLVED.

The pertinent part of Section 8(a)(3) of the Act is (29 U. S. C. Section 158(a)(3)):

> "It shall be an unfair labor practice for an employer . . . (3) by disrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization; *Provided*, That nothing in this Act, or any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, . . . (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: . . ."

The specific language of Section 9(e) of the Labor Management Relations Act is (29 U. S. C. Section 159(e)):

> "(1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8(a)(3) of this title, of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.
>
> (2) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held."

STATEMENT OF THE CASE.

This suit was instituted to enjoin the defendant, Ross M. Madden, as regional director of the National Labor Relations Board for the Thirteenth Region, from proceeding with the conduct of a union shop deauthorization election under 29 U. S. C. Section 159(e)(1). The defendant moved to dismiss the suit.

The facts alleged in plaintiff's complaint are admitted by the defendant's motion to dismiss. Plaintiff is the collective bargaining representative for all production, maintenance and shipping room employees of Harco Aluminum, Inc. Effective August 1, 1963 plaintiff and Harco Aluminum, Inc. entered into a three year collective bargaining agreement covering the employee unit above described (App. 3). This agreement contained a standard union shop clause requiring membership in the union as a condition of employment (App. 4). The employees of Harco Aluminum, Inc. unanimously approved and ratified the collective bargaining agreement and the union shop clause contained therein (App. 7).

On April 1, 1964 an employee of Harco Aluminum, Inc. filed a union shop deauthorization petition pursuant to Section 9(e)(1) of the Labor Management Relations Act seeking to rescind the union shop authority contained in said agreement (App. 4). Plaintiff objected to holding the election without a formal hearing in order to establish, inter alia, employee approval and ratification of the union security provisions in the agreement (App. 5, 7).

The defendant Madden on June 4, 1964, without granting plaintiff's request for a formal hearing, ordered the deauthorization election to be conducted on June 18, 1964 (App. 6, 10). Plaintiff immediately appealed to the General Counsel of the National Labor Relations Board in Wash-

ington, D. C. from the defendant's order of June 4, 1964. On June 12, 1964, plaintiff's appeal was denied (App. 6). Immediately thereafter, on June 16, 1964, plaintiff filed the within suit in the United States District Court seeking to enjoin the defendant Madden, his agents and representatives from proceeding with the deauthorization election on June 18, 1964.

The complaint charged that the defendant, in ordering the election without granting plaintiff any formal hearing, acted arbitrarily, contrary to, and in excess of the powers granted him and the National Labor Relations Board under the Labor Management Relations Act (App. 6). Plaintiff further asserted that the provisions of the Labor Management Relations Act in question, namely, Sections 8(a)(3)(ii) and 9(e)(1), clearly contemplated that the deauthorization election should only be effective at the termination of the existing collective bargaining agreement, and unquestionably so where the employees eligible to vote in the deauthorization election had unanimously approved and ratified the inclusion of a union shop clause in the agreement (App. 6, 7).

On June 17, 1964 the defendant filed its motion to dismiss the complaint. By agreement of the parties, the District Judge directed the deauthorization election to proceed on June 18, 1964 on the condition that all ballots would be impounded and the results of the election not publicized until further order of court. The court's direction of June 17, 1964 was embodied in a formal order entered on June 18, 1964 (App. 13).

An order of dismissal was entered on September 25, 1964 (App. 19, 20). In addition, on September 25, 1964, plaintiff filed its supplement to its complaint to have the prayer thereof conform to the direction of the court on June 17, 1964 and its order of June 18, 1964 (App. 17, 18).

THE DECISIONS BELOW.

The District Court determined that the issues presented in the complaint came within the Federal Court's jurisdiction as delineated by *Leedom* v. *Kyne*, 358 U. S. 184 and *Boire* v. *Greyhound Corporation*, 376 U. S. 473. On the merits, the District Court held that under Section 9(e)(1) a union shop clause could be rescinded during the life of an existing agreement. The Court stated that it would be contrary to the intent of Congress in enacting Section 9(e) of the Labor Management Relations Act to postpone all union shop deauthorization elections to termination of existing collective bargaining agreements. The District Court further held that the unanimous approval and ratification of the union shop clause in the contract by the employees in the unit was without significance under Section 9(e) of the Act.

The Court of Appeals affirmed the decision of the trial court on the merits, but held that the District Court "should have dismissed the complaint for want of jurisdiction of the subject matter" once it had "found that the Board had violated no clear statutory command or prohibition, and had contravened no constitutional safeguards".

REASONS FOR GRANTING THE WRIT.

1. The opinion of the Court of Appeals in this case is the first reported court decision involving the interpretation of Section 9(e) of the Labor Management Relations Act. (The opinion of the District Court only appeared in the Bureau of National Affairs Reports.) There are also few National Labor Relations Board precedents. The best known Board decision is *Great Atlantic and Pacific Tea Company*, 100 N. L. R. B. 1494 (1952). In the cited case a majority of the Board held that an election under

Section 9(e)(1) of the Act could be held at any time and that an affirmative vote for union shop deauthorization under that section should be given immediate effect. However, the majority of the Board who so decided did so upon the assumed basis that there was no approval or ratification of the union shop clause by the employees. The Board stated 100 N. L. R. B. at pp. 1498-1499:

> "*Our decision is founded* on the assumption that, as the employees concerned have never affirmatively authorized a union-security provision, the contracting union has such authorization upon a conditional basis only." (Emphasis supplied.)

The existence of specific and unanimous approval and ratification of the union security clause in the collective bargaining agreement in the case at bar was admitted by defendant's motion to dismiss. It follows that the majority of the Board in *A. & P.* would have reached a different result upon the record presently before this court.

Despite the fact that the Board in *A. & P.* underscored the importance of prior approval of the union shop clause by the employees in the unit, the courts below held it to be legally immaterial. They did so upon the sole authority of *Retail Clerks* v. *Montgomery Ward*, 316 F. 2d 754 (C. A. 7, 1963). In the cited case the Board permitted a decertification election to be held after three years of a five year collective bargaining agreement had elapsed. In that case the union argued that the decertification election was improper because the employees in the unit had ratified the contract. However, *Montgomery Ward* is entirely distinguishable from the case at bar. The Board has consistently followed contract-bar rules in decertification cases but never adopted such rules in deauthorization cases. In a decertification election the employees wish to rid themselves of a union that they no longer wish to represent them. In deauthoriza-

tion elections the employees only wish to eliminate the union shop clause, but at the same time retain the union as its sole collective bargaining agent and all of the other fruits of the contract. In the former case, the union has no further obligation to the employees who have decertified it. In the latter situation, the union must still fully perform each and every term of the collective bargaining agreement even though a vital term of that contract has been deleted. It follows that the crucial language of the majority members of the Board in *A. & P.* above referred to should control the issues presented by this record.

2. The District Court relied almost exclusively upon *A. & P.* for its interpretation of Section 9(e)(1) of the Labor Management Relations Act. The Court of Appeals in affirming the lower court on the merits of this case devoted only two short paragraphs to commenting on this section of the Act. There was no discussion in either of the opinions below regarding the specific statutory language of Section 9(e)(1) that an election thereunder was to determine only whether the union's *authority to make* a union security agreement should be rescinded.

Section 8(a)(3) of the Act permits inclusion of a union shop clause in a contract unless, within the preceding year, there has been an election under Section 9(e)(1) rescinding the *authority* of the union *to make* such an agreement. Under Section 9(e)(1), the employees in the unit may hold an election only on the issue of whether the *authority* given the union in Section 8(a)(3) should *be rescinded.* Thus, under the clear language of the statute only the issue of the union's *authority to make* such an agreement is involved in an election under Section 9(e)(1). There is not a single word in the statute that an election under this section shall determine whether an existing provision in a contract should be voided in mid-term. The statutory

language can only refer to rescission of the union's future authority to bargain for a union shop clause. Our position in this regard is immeasurably strengthened by the existence of prior employee approval.

To apply the lower courts' interpretation of the disputed sections of the Act to an existing contract will result in a complete distortion of the language of the statute and lead to disharmony in labor relations. Conforming to the Board's reasoning, during a three year contract, three deauthorization elections could be held. If the employees voted for deauthorization each time, and if the employer and the union reinserted the union shop clause at the end of each twelve month period, only confusion could result. The purpose of the Act would clearly be subverted.

On the other hand, under the provisions of Section 8(d) of the Act, the employer could refuse to reinsert the union shop clause during the remainder of the contract term. A deauthorization election held during the first weeks of a three year contract could thus result in a union shop clause being eliminated from the contract thereafter. Even if the majority of the employees subsequently wished to have the union shop clause reinserted in the contract, there is no machinery for them to effect this. This obviously leads to a calamitous situation and a complete distortion of the Congressional purpose as clearly and precisely set forth in Sections 8(a) (3) (ii) and 9(e) (1) of the Act. The only proper interpretation of these sections of the Act and the one that gives effect to the clear language therein contained is to limit deauthorization elections to determine only the *future authority* of the union to bargain for a union shop clause.

3. The issues presented in this petition do not concern mere abuse of discretion by the N. L. R. B., and do not in-

volve areas in which the courts have generally recognized the expertise of the Board. We have previously shown in this petition that a construction of Sections 8(a)(3) and 9(e)(1) of the Act which permits a union shop clause to be rescinded in mid-term, despite employee approval for its inclusion, deprives petitioner of a right assured to it by Congress. The complaint filed by petitioner in the District Court raised these important and valid legal issues before a court for the first time. The issues in the complaint in this cause presented the precise type of violation that this court was concerned with in *Leedom* v. *Kyne*, 358 U. S. 184. These issues are completely distinguishable from the factual issues presented in a suit brought by an employer in *Boire* v. *Greyhound Corporation*, 376 U. S. 473.

The courts have consistently treated plenary suits by labor unions in completely different fashion than such cases brought by employers. The courts created and applied this distinction because of the remedies available exclusively to employers, but not to unions, under the Labor Management Relations Act to challenge decisions of the N. L. R. B. in election cases under Section 9 of the Act. The petitioner in this cause has no judicial remedy of any kind but the within proceedings.

The District Court below held that the issues presented by petitioner's complaint gave the court jurisdiction of the subject matter. The Court of Appeals, however, held that once it was decided that the Board had properly interpreted the disputed sections of the Act that the District Court should have dismissed the cause for want of subject matter jurisdiction.

We respectfully urge that the issue of whether the court has jurisdiction of the subject matter should depend upon the issues raised in the complaint and not upon the eventual disposition of the merits of the case by the court.

CONCLUSION.

For the reasons above outlined, Petitioner respectfully submits that this Court should grant certiorari in this case.

Respectfully submitted,

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APPENDIX A.

Opinion of Court of Appeals, April 7, 1965.

Before DUFFY, KNOCH and CASTLE, *Circuit Judges.*

KNOCH, *Circuit Judge.* Plaintiff-appellant, Machinery, Scrap Iron, Metal & Steel Chauffeurs, Warehousemen, Handlers, Helpers, Alloy Fabricators, Theatrical, Exposition, Convention and Trade Show Employees, Local Union No. 714, International Brotherhood of Teamsters, hereinafter sometimes called the "Union," sought to enjoin defendant-appellee, Ross M. Madden, as Regional Director of the National Labor Relations Board for the Thirteenth Region, hereinafter sometimes called the "Board", from proceeding to conduct a union-shop deauthorization election pursuant to Title 29, U. S. C. § 159 (e)(1).

The defendant moved to dismiss the suit. The District Court allowed the election to proceed but provided for the ballots to be impounded and the results to remain unpublished pending disposition of this case. The Union then sought to enjoin publication and to have the ballots destroyed.

The Board contended that the Court lacked jurisdiction and that the complaint failed to state a claim on which relief might be granted.

The District Court granted the motion to dismiss on the second ground.

The facts as set out in the complaint indicate that plaintiff Union is the collective bargaining representative for all production, maintenance and shipping room employees of Harco Aluminum, Inc. Effective August 1,

1963, the Union and Harco entered into a three-year collective bargaining agreement which contained a provision which required membership in the Union as a condition of employment. The agreement, including the union-shop provision, was unanimously approved and ratified by the Harco employees.

On April 1, 1964, a Harco employee filed a union deauthorization petition pursuant to the Labor Management Relations Act, § 9(e)(1), to rescind the union-shop authorization.

A conference was had April 9, 1964, to arrange election details. Plaintiff then objected to holding the election without a formal hearing, and the following day filed written objections with a request for a formal hearing to establish, inter alia, the approval and ratification mentioned above.

Appeal to the General Counsel of the Board in Washington, D. C. (from the defendant's denial of that request on April 15, 1964) was held to be premature.

An order issued June 4, 1964, scheduling the deauthorization election for June 18, 1964. Plaintiff's appeal to the General Counsel from the order of June 4, 1964, was denied June 12, 1964, and on June 16, 1964, plaintiff Union filed its action in the United States District Court.

Although the ratification of the union security provision is admitted for this record by the motion to dismiss plaintiff Union's complaint, plaintiff feels denial of a hearing to enable plaintiff to establish that point violated plaintiff's Constitutional rights.

This ties in with plaintiff's contention that an affirmative vote for deauthorization by employees who previously ratified the union security provision cannot become effective prior to termination of the current collective bargaining agreement.

In any event, it is plaintiff's view that Congress intended by § 9(e)(1) to grant employees the right to revoke the authority of the union only as to bargaining for future union security provisions to be effective after termination of current contracts, and that the interpretation of § 9(e)(1) adopted by the Board and followed by the District Court is inconsistent with the Board's contract bar doctrine.

The pertinent provisions of the Act read:

§ 158.

(a) It shall be an unfair labor practice for an employer—

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement whichever is the later (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement:

29 U. S. C. § 159

(e)(1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit

> covered by an agreement between their employer and a labor organization made pursuant to section 158(a)(3) of this title, of a petition alleging they desire that such authority be rescinded, the board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.
>
> (2) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.

The District Court agreed that jurisdiction was lacking to entertain an action of a labor organization (allegedly aggrieved by a Board determination of the type now before us) to set aside the Board's determination unless that determination clearly transgressed a mandatory requirement of the statute or violated Constitutional provisions. *Leedom* v. *Kyne,* 1958, 358 U. S. 184, 187-8; *Local 1545, Carpenters* v. *Vincent,* 2 Cir., 1960, 286 F. 2d 127, 130; *Miami Newspaper Printing Pressman's Union* v. *McCulloch,* D. C. Cir., 1963, 322 F. 2d 993, 996; and cases therein cited.

We agree with appellee's contention that jurisdiction must rest on more than a mere allegation of unauthorized Board action. A prerequisite to review of the Board's order is the determination by the District Court that there is a violation of a clear and mandatory provision of the Act. In *Kyne,* on which plaintiff relies, the Board admitted that the action of which the union there complained did contravene a specific prohibition of the Act.

As the District Judge noted, the opinion in *Boire* v. *Greyhound Corp.,* 1964, 376 U. S. 473, 481, refers to the factual nature of the issue before it as contrasted with the legal issue of *Kyne* which depended on construction of a statute. Nevertheless, we cannot agree that District Court review of the Board action under § 9 of the Act is

not subject to similar limitations whether the error alleged is one of fact or law. *Kingsport Press* v. *McCulloch*, D. C. Cir., 1964, 336 F. 2d 753, cert. den. 379 U. S. 931.

In the case before us the District Court determined that:

> Accordingly, it is the judgment of this Court that the failure of the Board to grant plaintiff a hearing did not constitute a statutory or Constitutional violation. Further, we hold that the authorized election was entirely proper under the terms of Section 9 (e)(1), and that the union-shop provision may legally be rescinded during the term of the existing collective bargaining agreement. Plaintiff's motion for a temporary restraining order is denied, and defendant's motion to dismiss is granted.

Having found that the Board had violated no clear statutory command or prohibition, and had contravened no constitutional safeguards, the District Court, in our opinion, should have dismissed the complaint for want of jurisdiction of the subject matter.

We are in full agreement with the District Court that § 9(e)(1) contemplates that the parties are subject to a union security agreement at the time the deauthorization petition is filed. It refers to a petition filed by 30% or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization entered into pursuant to § 8(a)(3). We must conclude that Congress intended to provide relief from an existing union security clause, and that, as the District Judge stated:

> To postpone all deauthorization elections to such time as current agreements are terminated as plaintiff suggests, would be contrary to the intent of Congress.

We also conclude, as did the District Judge, that the employee ratification of the bargaining agreement, which

the Union sought to prove at a preelection hearing, presented no material issue. See *Retail Clerks* v. *Montgomery Ward*, 1963, 316 F. 2d 754.

Nothing in the Act requires the Board to establish or maintain contract bar rules. Two representation elections in the same unit for the certification or decertification of a bargaining representative are barred during one 12-month period. Two deauthorization elections in a unit are barred for the same period. §§ 9(c)(3), 9(e)(2). The fact that the Board has exercised its discretion to extend the period with reference to elections under § 9(c) in a unit covered by a lawful collective bargaining agreement does not require the Board to make similar rules respecting § 9(e) which relates only to one clause in a collective bargaining agreement. The same principles of maintaining a balance between stability in industrial relations and employee freedom of choice in selection of a bargaining representative (*Leedom* v. *IBEW*, D. C. Cir., 1960, 278 F. 2d 237, 241-2) do not apply with equal force to proceedings under § 9(e).

The order of the District Court dismissing the complaint is affirmed on the ground that the District Court lacked jurisdiction over the subject matter of the action.

AFFIRMED.

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 208

MACHINERY, ETC., LOCAL UNION NO. 714, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, PETITIONER

v.

ROSS M. MADDEN, AS REGIONAL DIRECTOR OF THE NATIONAL LABOR RELATIONS BOARD FOR THE THIRTEENTH REGION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE REGIONAL DIRECTOR OF THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 13–18) is reported at 343 F. 2d 497. The opinion of the district court (App. 14–17).[1] is not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 1965. The petition for a writ of cer-

[1] "App." refers to the Appendix to petitioner's brief in the court of appeals, copies of which have been filed with the petition.

780-515—65

tiorari was filed June 3, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the National Labor Relations Board may direct an election, pursuant to Section 9(e)(1) of the National Labor Relations Act, to determine whether employees desire to rescind the union security provision in an existing collective bargaining contract.

2. Whether a federal district court has jurisdiction to enjoin such an election.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at p. 3 of the petition.

STATEMENT[1]

Petitioner (the Union) is the collective bargaining representative of the production, maintenance, and shipping room employees of Harco Aluminum, Inc. (Harco), at its plant in Chicago, Illinois. Respondent is the Regional Director of the National Labor Relations Board for the Thirteenth Region.

Effective August 1, 1963, the Union and Harco concluded a three-year collective bargaining contract which embodied a lawful union security provision requiring union membership as a condition of employ-

[1] The facts are undisputed and are set forth in the complaint and exhibits attached thereto (App. 3–11).

ment. Less than one year later, on April 1, 1964, a petition was filed with the Regional Director, pursuant to Section 9(e)(1) of the Act,[3] seeking an election to rescind this union security provision. On June 4, 1964, the Regional Director ordered that such an election be conducted on June 18, 1964. The Board denied the Union's appeal from this order on June 12. On June 16, the Union filed the instant suit in the district court seeking to enjoin the election. The Regional Director moved to dismiss the complaint for lack of jurisdiction over the subject matter and for failure to state a claim warranting relief (App. 13).

The district court granted the Regional Director's motion to dismiss the complaint (App. 14–17). The court of appeals affirmed. The court of appeals held that the election to rescind the union security provision had been properly ordered under Section 9(e)(1) (Pet. 17–18); the court also held that, since "the Board had violated no clear statutory command or prohibition, and had contravened no constitutional safeguards, the District Court, in our opinion, should have dismissed the complaint for want of jurisdiction of the subject matter" (Pet. 17).[4]

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[3] The text of this statutory provision is set out *infra*, p. 4, n. 5.

[4] On June 18, following a hearing, but prior to its decision dismissing the complaint, the district court had entered an order directing the Regional Director to proceed with the election, but forbidding him to "certify the results thereof" and directing that the ballots be impounded pending further consideration of the case (App. 13–14). This order was extended pending appeal to the court of appeals (App. 20–21). The court of appeals has continued the stay pending the filing and disposition of the present petition for certiorari.

ARGUMENT

The decisions below, adopting the Board's construction of the relevant provisions of the National Labor Relations Act, are correct. No conflict in decisions is asserted and there is no reason for further review.

1. Section 8(a)(3) of the Act (Pet. 3) permits an employer and union to enter into a union security agreement requiring union membership as a condition of continued employment. This permission, however, does not apply if,

> * * * following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement * * *.

Section 9(e)(1) provides the procedure for invoking such an employee election to rescind the union's authority to enter into a union security agreement.[5]

In this case, the Board ordered an election under Section 9(e)(1) to determine whether to rescind a union security agreement in a contract concluded several months prior to the election order. The Union

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[5] Section 9(e) provides:

> (1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8(a)(3) of this title, of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

contends that the order was improper for, in its view, Section 9(e)(1) does not permit an election to rescind the union security provisions of an *existing* agreement but merely affects a union's authority to enter into a union security agreement in the future (Pet. 8–10). The Union relies upon the Act's description of the election as one "to rescind the authority of such labor organization *to make* such an agreement" (emphasis added) as indicating its inapplicability to existing agreements. As the Board, the district court, and the court of appeals have held, however, the Union's interpretation of the deauthorization provision as applying only to future agreements would largely frustrate the principal purpose of the provision, which was to prevent a union security agreement from being imposed upon employees without the consent of a majority. The courts below therefore properly rejected the Union's unduly limiting construction.

Under the original 1947 Taft-Hartley amendments, a union security arrangement was permitted only if a majority of the employees, in an election conducted by the Board, affirmatively authorized their representative to enter into such an agreement. Section 9(e)(1) of the 1947 Act provided for such an authorization election. Subparagraph (2) of that section went on to empower the Board to conduct a second election if a petition were filed alleging that the employees desired to rescind an authority previously granted. 61 Stat. 144–145.

In 1951, Congress abolished the affirmative authorization election, finding that "[s]uch elections have

* * * involved a large expenditure of funds and have almost always resulted in a vote favoring the union-shop."[6] Congress, however, made clear its purpose to continue "to safeguard employees against subjection to union shop agreements which a majority disapproves."[7] To this end, the provision for a union security deauthorization election was retained.[8] Under the present statute, therefore, a union security agreement can now be concluded without a majority of the employees first affirmatively authorizing that action through a Board election. For this reason, the continuing explicit legislative purpose to prevent "subjection to union shop agreements which a majority disapproves" can be achieved only by permitting Section 9(e)(1) elections to rescind union security provisions in existing contracts. As the Board stated in reaching this conclusion in *Great Atlantic & Pacific Tea Company*, 100 NLRB 1494, 1497:

> Only by holding that an affirmative deauthorization vote immediately relieves employees of the obligations imposed by an existing union-security agreement can this Board give effect to the basic congressional objective, unchanged by amendments directed solely at procedural relief, of not imposing a union-security agreement upon an unwilling majority.

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[6] H. Rep. No. 1082, 82d Cong., 1st Sess., 2–3; S. Rep. No. 646, 82d Cong., 1st Sess., 1.

[7] *Ibid.*

[8] The provision of the 1947 Act for such elections, Section 9(e)(2), was renumbered Section 9(e)(1), in view of the elimination of the prior provision for affirmative union security authorization elections.

Accord: *Andor Co.*, 119 NLRB 925, 926; *Pearl Curtains*, 118 NLRB 1120, 1121; *Monsanto Chemical Co.*, 147 NLRB 49. And see *Schultz* v. *National Labor Relations Board*, 284 F. 2d 254, 262 (C.A.D.C.), opinion of Judge Danaher dissenting on other grounds.[9]

2. There is no substance to the Union's further contention (Pet. 6–8) that the Board was barred from conducting the deauthorization election in this case because the employees here had in fact affirmatively authorized the union security provision of the existing agreement. The Union's complaint alleges that "the employees who are eligible to vote at [the] deauthorization election unanimously approved the collective bargaining agreement * * * and the union security clause" (App. 7). This informal "ratification" was secured under union auspices, with no assurance that a representative complement of employees participated. It is not comparable to a Board election.[10] A different conclusion is not re-

[9] The Union contends that, under the Board's interpretation, there could conceivably be three deauthorization elections during the life of a three-year contract, thereby leading to "confusion" (Pet 9). But this could occur only in the unlikely event that the Union insisted upon reimposing a union security provision on employees despite their repeated manifestations to the contrary.

[10] Indeed, under the pre-1951 statutory scheme, it was recognized that such methods of approval under union auspices were no substitute for the affirmative authorization election procedure originally contained in Section 9(e) of the Act. *United Mine Workers* v. *National Labor Relations Board*, 184 F. 2d 392, 393 (C.A.D.C.), enforcing as modified, 83 NLRB 916, 919–920.

quired by the excerpt from the Board's *A & P* decision, *supra*, relied on by petitioner (Pet. 7). In noting there that "the employees concerned have never affirmatively authorized a union-security provision," the Board merely referred to the fact that the 1951 amendment eliminated the procedure for an affirmative Board authorization election; the Board was not suggesting, as petitioner assumes, that the result in *A & P* would have been different had there been prior employee "approval" by some informal means.

3. Since the Board's election order in this case was not "made in excess of its delegated powers and contrary to a specific prohibition in the Act" (*Leedom* v. *Kyne*, 358 U.S. 184, 188), the court of appeals properly held that the district court lacked jurisdiction to entertain the injunction proceeding and should have dismissed for lack of jurisdiction without finally deciding the merits of the Union's claim. See the Opposition filed on behalf of the Regional Director in *The Miami Herald Publishing Co.* v. *Boire*, No. 225, October Term, 1965, pp. 7–13. The limited nature of the jurisdiction conferred by *Kyne*, to interfere with Board election orders, has recently been emphasized by the Court on three separate occasions. *McCulloch* v. *Sociedad Nacional*, 372 U.S. 10, 16–17; *Boire* v. *Greyhound Corp.*, 376 U.S. 473; *Brotherhood of Railway Clerks* v. *Association for the Benefit of Non-Contract Employees*, 380 U.S. 650. The exception clearly does not apply to this case, where the Board's order was clearly in furtherance of the evident statutory purpose.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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